Public Prosecutor v Azwan Irewan bin Rosni

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45–63 OF 2005
JEFFREY TAN J
4 DECEMBER 2008

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in cannabis — Whether charge of trafficking established — Custody, control and/or possession — Whether charge ought to be amended to one of possession

Acting on information received concerning drug trafficking activities, the police arrested the accused who was carrying a plastic bag. From the bag, police recovered a compressed block of plant material, later confirmed to contain 860.42g of cannabis. The accused was charged with drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) of the same. At the close of the prosecution's case, counsel for the accused submitted, inter alia, that a case of drug trafficking could not be made out against the accused and instead this was merely a case of passive possession. The prosecution however, contended that there was direct evidence of possession and direct evidence of trafficking.

Held, amending the charge to the lesser offence of possession and convicting the accused on his plea of guilt thereto:

(1) The word 'possession' is an enigmatic and vague word and not statutorily defined. Judicial pronouncements on its meaning include some degree of custody or control, and knowledge of the custody and control (see para 10).

(2) In the instant case, there was no direct evidence of trafficking. Although it could be argued that the accused had transported the bag and contents to the place where he was apprehended, the mere act of carrying is not sufficient to constitute the offence of trafficking. To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 2 of the DDA involves something more than passive possession or self-administration of the drug. It involves doing or offering to do an overt act of one or other of the kinds specified in the definition of 'traffic' and 'trafficking' under s 2. The ordinary meaning of the words 'to traffic'means the existence, either in fact or in contemplation of at least two parties, ie a supplier and a person to whom the goods are to

be supplied (see para 21). *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 (followed); *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (followed).

(3) In the instant case, the case against the accused proceeded only on the singular fact that the accused had in his hand a plastic bag containing a single compressed block of 860.42g of cannabis. On that undoubted fact, it could be concluded that the accused must have had knowledge of his custody and or control and or possession of the bag. The accused could not have been unconscious of the bag in his hand. It could be reasonably inferred that the accused must have had knowledge of the contents inside that plastic bag in his custody, control and/or possession. On the facts, the reasonable inference must be that the accused was aware of that in his custody, control and/or possession. It was definitely a case of custody, control and/or possession and with full knowledge thereof (see para 21).

(4) From the facts, the quantity of drugs involved was not such that it could be irresistibly inferred that it could not have been for personal consumption. If it was possession, then trafficking was made out only on a not too strong presumption of trafficking. If it was a case of custody and/or control, then trafficking was not made out at all in the absence of evidence of an overt act. A ruling that it was possession would attract the presumption of trafficking. A ruling that it was custody and/or control would mean that trafficking was not made out. Thus, it would be more just, fair and infinitely safer, to give the benefit to the accused and find that the lesser offence of possession had been made out (see para 22).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diperoleh berkenaan aktiviti-aktiviti pengedaran dadah, polis telah menahan tertuduh yang membawa satu beg plastik. Daripada beg itu, polis menemui satu blok mampat tumbuhan, yang kemudiannya disahkan mengandungi 860.42g kanabis. Tertuduh dituduh mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya ('ADB'), dihukum di bawah s 39B(2) ADB. Pada akhir kes pendakwaan, peguam bagi pihak tertuduh mengemukakan bahawa kes mengedar dadah tidak dapat dibuktikan ke atas tertuduh sebaliknya ini hanya merupakan kes milikan pasif. Pihak pendakwaan walau bagaimanapun, menegaskan bahawa terdapat bukti yang jelas mengenai milikan dan pengedaran.

Diputuskan, meminda tuduhan kepada kesalahan milikan dan mensabitkan tertuduh atas akuan bersalahnya.

(1) Perkataan 'milikan' adalah satu perkataan yang membingungkan dan

kabur dan tidak didefinisikan secara statutori. Pengumuman kehakiman mengenai maksud perkataan itu melibatkan tahap jagaan atau kawalan, dan pengetahuan mengenai jagaan dan kawalan (lihat perenggan 10).

(2) Di dalam kes ini, tiada bukti jelas tentang pengedaran. Walaupun boleh dipertikaikan bahawa tertuduh telah memindahkan beg dan isi kandungannya ke tempat dia diberkas, tindakan membawa dadah tidak mencukupi untuk menjadi kesalahan mengedar. Bagi 'mengedar' dadah yang terkawal menjadi kesalahan mengedar di bawah s 2 ADB memerlukan lebih daripada milikan pasif atau penggunakan sendiri dadah berkenaan. Ia melibatkan penggunaan atau menawarkan diri untuk melakukan tindakan secara terang-terangan atau sepertimana yang terkandung di dalam definisi 'mengedar' di bawah s 2, maksud perkataan 'untuk mengedar' lazimnya bermaksud kewujudan, sama ada dalam fakta atau fikiran kedua-dua pihak, iaitu pengedar dan kepada siapa barang itu diedarkan (lihat perenggan 21). *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 (diikut); *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (diikut).

(3) Dalam kes ini, kes ke atas tertuduh cuma diteruskan atas satu fakta bahawa tertuduh memiliki beg plastik yang mengandungi satu blok mampat kanabis seberat 860.42g. Daripada fakta yang tidak ragui itu, bolehlah dirumuskan bahawa tertuduh semestinya mempunyai pengetahuan mengenai jagaan, atau kawalan atau milikan beg itu. Secara munasabahnya boleh dirumuskan bahawa tertuduh mesti mempunyai pengetahuan mengenai isi kandungan yang berada di dalam beg plastik dalam jagaan, kawalan dan/atau milikannya. Berasaskan fakta-fakta, inferens yang munasabah adalah, tertuduh sedar bahawa dadah itu di dalam jagaan, kawalan atau milikannya. Ini semestinya kes jagaan, kawalan dan/atau milikan dengan pengetahuan sepenuhnya (lihat perenggan 21).

(4) Daripada fakta-fakta, kuantiti dadah yang terlibat bukanlah sesuatu yang tidak dapat diramalkan bahawa dadah tersebut bukan untuk kegunaan sendiri. Sekiranya merupakan satu milikan, maka pengedaran disimpulkan menerusi anggapan pengedaran yang lemah. Jika merupakan milikan dan/atau kawalan, maka pengedaran tidak berlaku sama sekali memandangkan tiada bukti mengenai tindakan terang-terangan itu. Suatu keputusan memutuskan adalah merupakan milikan boleh dikaitkan dengan anggapan mengedarkan. Oleh itu, adalah lebih adil, saksama dan selamat untuk memberi faedah kesangsian kepada tertuduh dan mengenakannya kesalahan milikan yang lebih ringan (lihat perenggan 22).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Badrulsham bin Baharom v PP [1988] 2 MLJ 585, HC (refd)
Director of Prosecutions v Brooks [1974] AC 862, PC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)
Ho Seng Seng v Rex [1951] MLJ 225, HC (refd)
Lee Kwan Woh v PP [2008] 3 MLJ 674, CA (refd)
Leow Nghee Lim v Reg [1956] MLJ 28, HC (refd)
Mohamad Radzi bin Abu Bakar v PP [2002] 3 MLJ 593, CA (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314, CA (refd)
Muhamad Safarudin bin Baba & Anor v PP [2002] 4 MLJ 353; [2002] 4 CLJ 210, CA (refd)
Neo Koon Cheo v Reg [1959] MLJ 47, HC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (folld)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (folld)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Ahmad Rashdan bin Shamsher [1994] 1 LNS 126, HC (refd)
PP v Ang Boo Foo [1981] 1 MLJ 40, HC (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161, FC (refd)
PP v Johar Mustafa [2004] 5 CLJ 187, HC (refd)
PP v Karim bin AB Jabar [2008] 3 MLJ 685, CA (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91, SC (refd)
PP v Lai Ah Bee [1974] 2 MLJ 74, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
PP v Sukumaran a/l Sundram [1999] 4 MLJ 462, HC (refd)
PP v Suzie Adrina bte Ahmad [2006] 5 MLJ 135, CA (refd)
PP v Tan Kim Piow [2006] 5 MLJ 409; [2006] 3 CLJ 717, CA (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685; [2005] 6 AMR 543, FC (refd)
R v Ashwell (1885) 16 QBD 190 (refd)
Reza Mohd Shah bin Ahmad Shah v PP [2006] 2 MLJ 223; [2005] 4 CLJ 581, CA (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158, HC (refd)
Toh Ah Lok and Mak Tin v Rex [1949] MLJ 54, CA (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415, CA (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 6 AMR 543 CA (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), (4)
Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da), (da)(vi), 39A(2), 39B(1), (1)(a), (2)

Juanita bte Mohd Said (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Sukhaimi bin Mashud (Teh Poh Teik & Co) for the accused.

Jeffrey Tan J:

[1] The accused was tried for the following capital offence.

> Bahawa kamu pada 17.01.2005 jam lebih kurang 11.15 malam, di tepi Jalan Sri Pelangi, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iaitu sejumlah 860.42 gram cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] Of the six witnesses who testified for the prosecution, only two (SP2 and SP4) were allegedly at the scene. And the collective of SP2 and SP4 could be summarised as follows.

[3] On 17 January 2005, Chief Inspector Norhisham bin Mustapa (SP2) received information relating to drug trafficking activities at Jalan Sri Pelangi near 'Restaurant Soon Mee' by a Malay male using car bearing registration No JFE 7604 (that evidence was admitted as proof of the fact of the information, but not of the facts asserted in the information). That night, at 10pm, SP2 briefed and then divided his raiding party (altogether seven men) into three groups. Thereafter, SP2 and his raiding party took positions at Jalan Sri Pelangi, all near Restaurant Soon Mee. At 11.15pm, a car bearing registration No JFE 7604 with only a Malay male inside (identified as the accused) drove passed SP2 and entered Jalan Sri Pelangi. SP2 alerted and instructed his police party to stand by for the raid. JFE 7604 stopped right in front of Restaurant Soon Mee. The accused alighted and walked towards the rear of JFE 7604. The accused had a pink plastic bag. The police party then closed in on the accused. Lance Corporals Mohd Yusof and Sukri apprehended the accused. At that point, the accused had a plastic bag (P9) in his right hand. SP2 identified himself and then frisked the body of the accused. There were two mobile phones in the pockets of the accused. SP2 searched the plastic bag. In that plastic bag, SP2 found a compressed block of a plant material (balance of plant material after analysis marked as PUS) wrapped in clear plastic. There was no other content in that bag. According to SP2, 'Reaksi OKT adalah terperanjat.' SP2 then arrested the accused. Nothing incriminating was recovered from JFE 7604. The police party together with the accused and exhibits then proceeded to 310 Jalan Antoi Kuning, Kampong Datuk Hjh Hasnah Ahmad Majidi, Johor Bahru. From there, the police party together with the accused and exhibits proceeded to the police contingent headquarters, whereat, SP2 lodged his report (JB Selatan 1427/05), prepared the search list, marked the drug exhibits with his

signature and pertinent date, and handed the accused and all exhibits (accused's identity card, two mobile phones, accused's purse, cash of RM350, plastic bag and compressed block, ignition key of JFE 7604, and JFE 7604) to the investigation officer (SP5). Incidentally, it was the unchallenged evidence of the government chemist (SP3 — Soupy bin Daud) that the said compressed block contained 860.42g of cannabis.

[4] At the close of the prosecution case, Mr Sukhaimi for the accused submitted that mere possession is not enough to prove trafficking. To support that proposition, learned counsel referred to *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685; [2005] 6 AMR 543,; *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223; [2005] 4 CLJ 581 (where both accused had the dangerous drug in their hands, and where it was held that there was no evidence of trafficking, and that s 37(da) of the Dangerous Drugs Act 1952 ('the DDA') could not be invoked), *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 AMR 224, and *Public Prosecutor v Tan Kim Piow* [2006] 5 MLJ 409; [2006] 3 CLJ 717. Learned counsel also cited *Muhamad Safarudin bin Baba & Anor v Public Prosecutor* [2002] 4 MLJ 353; [2002] 4 CLJ 210, where it was held by the Court of Appeal that s 37(da) of the DDA could be rebutted by other factors. Learned counsel argued that there was no evidence that the accused knew the nature of the thing in his hand, that s 37(d) must necessarily be invoked to prove possession, that s 37(da) could not therefore be invoked, that there was no evidence of an overt act, and that it was only a case of passive possession.

[5] The learned deputy prosecutor, Puan Juanita bte Mohd Said, made the following arguments. The accused was caught with the bag in his hand. The content of the bag could be seen. There was nothing else in that bag. There could be no question of the absence of knowledge. The prosecution need not rely on s 37(d) of the DDA. There was direct evidence of possession and knowledge of possession. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 at p 69, it was held that conveying could be trafficking. The accused was conveying and that was direct evidence of trafficking. In any event, the prosecution is entitled to rely on s 37(da). Learned DPP then referred to *Lee Kwan Woh v Public Prosecutor* [2008] 3 MLJ 674, where it was allegedly held by the Court of Appeal that s 37(da) provided the evidence of trafficking.

[6] Section 180(1) of the Criminal Procedure Code ('CPC') provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused. A prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction' (s 180(4) of the CPC which came into effect on 7 September 2007 'cannot apply retrospectively':

Public Prosecutor v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161 per Zaki Azmi PCA, as he then was), which statutory definition more or less codified the long standing pronouncement in *Public Prosecutor v Sukumaran a/l Sundram* [1999] 4 MLJ 462 at p 477, that post amendment Act A979:

> a prima facie case is made out where there is sufficient credible evidence establishing each essential ingredient of the offence for a supposition of guilt if it is not answered by the accused.

[7] The instant charge was trafficking in cannabis, a dangerous drug. The first ingredient of the offence was trafficking (*Public Prosecutor v Ahmad Rashdan bin Shamsher* [1994] 1 LNS 126). 'Trafficking' is defined in s 2 of the DDA to include, 'the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug'. However in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 at p 428, Augustine Paul J, as he then was, qualified that:

> the mere act of, say, 'keeping', or 'concealing' or 'carrying' dangerous drugs as enumerated in s 2 of the Act will not constitute 'trafficking' without any further evidence of an intention to trade or deal in them.

[8] If the act were no more than possession, s 37(da)(vi) of the DDA provides:

> any person who is found in possession of 200 grammes or more in weight of cannabis otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[9] As said, the evidence of the chemist was unchallenged. But the evidence of SP2 and SP4 was challenged, for it was put to SP2 and or SP4, who firmly denied it was so, that the accused had nothing in his hand when he was apprehended, and that the bag and content were left behind by a passenger and were recovered from inside the car. Still, it must be said that the evidence of SP2 and SP4 was absolutely rock solid, to the point establishing that fact beyond all doubt, that the accused had the bag containing the said compressed block of cannabis in his right hand when he was apprehended. It was also established that the accused had driven to the place where he was apprehended. From those two undoubted established facts, it could be extrapolated that the bag and content would have been with the accused as he drove to the place where he was apprehended. That was the total evidence against the accused. What was proved, in relation to the charge?

[10] There is no statutory definition of 'possession', a word said to be enigmatic and vague. However, judicial pronouncements on its meaning include invariably some degree of custody or control, and knowledge of the custody or control (see *Toh Ah Lok and Mak Tin v Rex* [1949] MLJ 54; *Ho Seng Seng v Rex* [1951] MLJ 225; *Leow Nghee Lim v Reg* [1956] MLJ 28; *Director of Prosecutions v Brooks* [1974] AC 862; *Public Prosecutor v Lai Ah Bee* [1974] 2 MLJ 74; *Badrulsham bin Baharom v Public Prosecutor* [1988] 2 MLJ 585) but 'a man has not possession of that of the existence of which he is unaware' (per Cave J in *R v Ashwell* (1885) 16 QBD 190 at p 201; see also *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158). 'Mere knowledge however is not sufficient to establish possession' (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137), but the power of disposal (see *Public Prosecutor v Ang Boo Foo* [1981] 1 MLJ 40) is no longer an ingredient needed to support a conviction in a dangerous drugs trial (see *Public Prosecution v Kau Joo Huat* [1988] 2 MLJ 91). In *Leow Nghee Lim*, Taylor J explained the meaning of custody 'as having care or guardianship ... knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession', while Ambrose J in *Neo Koon Cheo v Reg* [1959] MLJ 47 explained that 'custody is actual physical control and control must be construed to mean any form of control other than actual physical control'.

[11] Two recent cases illustrate that even without actual physical custody, it could still be possession. In *Public Prosecutor v Karim bin AB Jabar* [2008] 3 MLJ 685, the respondent was tried under s 39B(1)(a) of the DDA. The High Court made the following findings; (a) the respondent was driving motorcar PDJ 31 that the police party stopped; (b) members of the police raiding party did identify themselves as police officers to the respondent; (c) the respondent put up a scuffle and was promptly placed under arrest; (d) the police did find several packages containing dangerous drugs from the front passenger seat and the boot of the car. At the close of the case for the prosecution, the High Court acquitted and discharged the respondent without calling for his defence. On appeal, the Court of Appeal per Gopal Sri Ram JCA held that the proximity of the respondent to the drugs at the front passenger seat was a fact relevant to establish actual physical possession, and that given that the quantity of drugs was far in excess of that required for personal use, there ought to have been drawn from the totality of the evidence the inference that the respondent was conveying the drugs for the purpose of trafficking in it. In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, the respondent was charged with trafficking in 4,826.9g of cannabis. The evidence was that one package under the driver's seat and two packages under the front passenger's seat in the car driven by the respondent contained cannabis. The respondent's defence was that although he knew the existence of the three packages in the car, which he claimed were put in the car by Jiri, he had no knowledge that they contained drugs. The respondent was convicted. The Court of Appeal held that the trial court had erred in

admitting the cautioned statement, set aside the conviction under s 39B(2) of the DDA and substituted with an offence under s 6, punishable under s 39A(2) of the DDA, held that there was sufficient evidence establishing beyond doubt that the respondent had custody and control of the three packages, and invoked the presumption of possession. However, the Federal Court held that apart from the caution statement there was sufficient evidence to support the finding of the trial court, and that on the facts and in the circumstances it ought to be the finding that the respondent had possession of the drug independent of the statutory presumption under s 37(d) of the DDA.

[12] As for the proof of knowledge, it is often a matter of inference (for a detailed discussion on the proof of knowledge by drawing inferences, see *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13). In *Mohamad Radzi bin Abu Bakar v Public Prosecutor* [2002] 3 MLJ 593, where the facts were that a customs officer went to the middle of the road and held up a stop sign which read 'Berhenti Kastam' ('Stop Customs') to intercept an approaching motorcycle. The rider did not stop, made a turn and headed away in the opposite direction. At the same time the pillion rider jumped from the motorcycle and ran away. Both rider and pillion were eventually arrested. The rider was wearing a long sleeved jacket over a short-sleeved jacket. From the right inner pocket of the long sleeved jacket a package wrapped in Thai newspaper was taken out and another similarly wrapped package was taken from the left inner pocket. From the left and right pockets of the inner jacket were recovered similarly wrapped packages. All four packages recovered from the two jackets contained dry plant material were found to be 'cannabis' as defined under the DDA.

[13] Pertinent to 'inferences', 'possession', 'direct evidence of possession', and 'direct evidence of trafficking', KC Vohrah JCA imparted the following:

> The case in this appeal is not complicated and the facts establishing a prima facie are obvious. The learned judge had relied on s 37(d) of the DDA from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of the cannabis, P4 and P5, one in the right and the other in the left inner pockets of the jacket the gross weight being about 180g... Anyone wearing it would have felt the packages sticking against the chest and the jacket being weighed down by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192g ... There cannot have been but a deliberate act on his part to have worn two jackets with packages and it would be

an attack on common sense to say that he did not know the packages were packages of cannabis. In any event from the nature of the cross-examination of the witnesses there was no question put to the prosecution witnesses to show that the accused was not aware that he was carrying the four packages or that he was not aware that he was carrying cannabis ...

The other telling piece of evidence which has to be taken into account which shows that clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signalled to stop by a customs officer who held up a customs stop sign 'Berhenti Kastam' instead of stopping he turned around and headed in the opposite direction.

Thus, at the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature there was also positive evidence that he fell within the meaning of 'trafficking' as defined in s 2 of the Act, which states:

> In this Act, unless the context otherwise requires:
>
> > 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting, carrying*, sending, delivering, procuring, supplying, or distributing any dangerous drug. (Emphasis added.)
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> There was no evidence to show the context to be otherwise that he was carrying and transporting, all the while knowing what he was doing — knowingly carrying the drugs on his person and riding on a motorcycle with it from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit cannabis. There was very strong prima facie evidence of trafficking in the dangerous drug.
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> Thus when the trial judge called upon the accused to make his defence on the charge of trafficking in the cannabis there was ample positive evidence for him to do so although he had invoked s 37(1)(da) to presume that the accused was trafficking in the drug and the accused elected to make his defence on oath.

[14] In so far as the DDA is concerned, 'any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug': s 37(d).

[15] A finding of custody or control raises a presumption of possession and knowledge of the nature of the drug. However, there cannot be any automatic

application of the presumption of trafficking under s 37(da) upon the presumption of possession and knowledge under s 37(d) (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). 'To constitute possession under s 37(da) of the Act ... there must be an express affirmative finding of possession ...' (*Muhammed bin Hassan* at p 289). 'To arrive at the presumption of trafficking under section 37(da), a finding of being in possession of the drug is necessary'(*Muhammed bin Hassan* at p 289). Without an express affirmative finding of possession, s 37(da) cannot be applied, and trafficking must necessarily be made out by evidence. Trafficking is not made out on just a finding of custody or control. Accordingly, without recourse to s 37(da) and in the absence of any other evidence, in *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224, the Court of Appeal per Mohd Ghazali JCA held that the evidence only established that the appellant was in custody and control of the dangerous drugs but not of some other overt act.

> The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as passive possession in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had knowledge. But to constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) of the Act as has been decided in *Muhammad bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (see also *Pendakwa Raya v Tan Tatt Eek* [2005] 2 MLJ 685).

[16] The rationale is that with a finding of custody or control, but without recourse to s 37(da) of the DDA, there must be evidence of an overt act to prove trafficking. But it had not always worked out that way. In *Public Prosecutor v Tan Kim Piow* [2006] 5 MLJ 409, the Court of Appeal held that independent of any presumption it was possession but nonetheless ruled that there must be evidence of an overt act. Possession was the express affirmative finding, but s 37(da) was not invoked.

> We find it unnecessary to deal with this argument. In our judgment, independent of any presumption there is sufficient evidence led by the prosecution from which a strong inference that the accused had knowledge of the drug and that it was in his exclusive physical possession may be drawn. And exclusive possession is a *sine qua non* in a case of this nature (see *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632).
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> ... we would observe that the facts proved in the present instance lead to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other

words, the accused had mens rea possession (see *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158). We would here emphasize that knowledge like other states of mind is a fact that is to be inferred from surrounding circumstances (see *Wong Lam Noi v Public Prosecutor* [1997] 3 MLJ 795 and *Tay Kah Tiang v Public Prosecutor* [2001] 2 SLR 305).

... The learned deputy also made a rather diffident second submission that we should remit this case for defence to be called on the original charge of trafficking. However, under pressure of argument she quite rightly retreated from the position she originally took. We must make it abundantly clear that taking the prosecution's case at its highest does not even remotely support the charge of trafficking. For, all that was proved here were the elements of passive mens rea possession. To constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act: mere passive possession is insufficient (see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; *Mohamad Yazri Minhat v Public Prosecutor* [2003] 2 MLJ 241).

[17] And in *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415, the Court of Appeal reiterated that possession in ss 2 and 37(da) is not mere physical possession but mens rea possession (for meaning of 'mens rea possession', see *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 but as qualified by *Kau Joo Huat*). The affirmative finding of the appellate court was 'mens rea possession', but it was nonetheless held that 'mens rea possession' must be accompanied by some overt act.

Because of the way in which the case was tried and argued in the court below, we think it apposite to re-state the law on the subject of actual trafficking of drugs. In a case where the prosecution is relying on evidence of possession to prove actual trafficking by having resort to the definition in s 2, such possession must be accompanied by some overt act on the part of the accused to be able to constitute trafficking. See *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; *Public Prosecutor v Nik Ahmad Aman* [2002] 2 MLJ 641; *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 3 MLJ 241. In other words, mere passive possession is insufficient to establish a case of actual trafficking.

Where the prosecution relies on possession accompanied by some overt act on the part of the accused as constituting the offence of trafficking, the court is concerned with two questions. First, whether the accused had mens rea possession of the proscribed drug. This is because the word 'possession' appearing in ss 2 and 37(da) of the Act does not connote mere physical possession. Second, the purpose for which he had the proscribed drug in his possession. Although in most, if not all cases, the evidence presented to the court is common to both questions it is nevertheless important to address the two questions.

[18] *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 was cited in both *Public Prosecutor v Tan Kim Piow* and *Wjchai Onprom v Public Prosecutor* to support the proposition that there must be mens rea possession accompanied by some overt act to constitute trafficking under s 39B(1) of the

DDA. In *Mohamad Yazri bin Minhat v Public Prosecutor*, the trial court held 'that the accused was in exclusive control and custody of the cannabis in the car' and that 'the accused was in possession of the cannabis'. The law report was not clear as to whether the trial court's finding of possession was by recourse to s 37(d) or was an affirmative finding of possession under s 37(da). In any event, the Court of Appeal found as follows:

> It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For that reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

[19] If it were a case of an affirmative finding of possession, then s 37(da) of the DDA was not invoked in *Mohamad Yazri bin Minhat v Public Prosecutor*, albeit the humongous quantity (133kg) of dangerous drugs. If s 37(da) were invoked, then there should be no necessity for the exercise to find the purpose of the transporting of the said drugs, as upon positive proof of possession without relying on s 37(d), the prosecution was entitled to rely on s 37(da) to support a charge of trafficking. That was the pronouncement of the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193, where Arifin Zakaria FJ said as follows:

> It ought to be stated at the outset that the decision in *Muhammed bin Hassan* only prohibits the use of double presumptions under ss 37(d) and 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support a charge under s 39B of the Act. See *Tunde Apatira & Ors v Public Prosecutor*, *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, a decision of Court of Appeal which was confirmed by this court in Federal Court Criminal Appeal No 05–27 of 2004(K). Conversely, the prosecution may rely on the presumption under s 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s 37(da)) that the accused was in fact trafficking in the dangerous drug.
>
> ... where an accused is shown to be a trafficker under s 39(B)(1)(a) of the Act, the weight of the drug he or she carries has no bearing whatsoever on his or her commission of the offence.

Public Prosecutor v Suzie Adrina bte Ahmad [2006] 5 MLJ 135 at p 143 per Gopal Sri Ram JCA.

[20] The prosecution may rely on direct evidence of trafficking, of the

drugs found in possession. In *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, it was contended that the trial court had resort to s 37(d) to presume possession and then invoked s 37(da) to hold that the appellant was a trafficker in the particular proscribed drug. Gopal Sri Ram JCA said:

> We have carefully scrutinised the way in which the learned judge directed himself on the law and the evidence and we find no justification in the criticism levelled against his approach to the case. It is quite apparent that the learned judge appreciated this to be a case where there was direct evidence of trafficking and it is to that evidence that he directed his mind. It was only after he had determined as a fact that the appellant was actually trafficking the heroin found in her possession that he proceeded to convict her.

[21] There was no direct evidence of trafficking in the instant case. Granted, it was established that the accused had the bag and content with him as he drove to the place where he was apprehended. Hence, it could be argued that the accused had transported the bag and content to the place where he was apprehended. But '... the mere act of carrying is not sufficient to constitute the offence of trafficking' (*Public Prosecutor v Abdul Manaf bin Muhamad Hassan* per Arifin Zakaria FCJ, as he then was). 'To 'traffic' in a controlled drug so as to constitute the offence of trafficking under section [2] involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in ... the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied.' (*Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, at p 68 per Lord Diplock). '... the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into' (*Mohamad Yazri bin Minhat v Public Prosecutor* at 249 per Gopal Sri Ram JCA). The distance travelled could indicate the purpose for which the drugs were moved (*Public Prosecutor v Johar Mustafa* [2004] 5 CLJ 187). But in the instant case, there were no factors or circumstances for to say that the purpose for which the drugs were moved was to transfer possession. In truth, the case against the accused had only the singular fact that the accused had in his hand a plastic bag containing a single compressed block of 860.42g of cannabis. On that undoubted fact, it could be concluded that the accused must have had knowledge of his custody and or control and or possession of the bag. The accused could not have been unconscious of the bag in his hand. It could be reasonably inferred that the accused must have had knowledge of the content inside that plastic bag in his custody control

and or possession. On the facts, the reasonable inference must be that the accused was aware of that in his custody, control and or possession. It was definitely a case of custody, control and or possession and with full knowledge thereof.

[22] But was it a case of custody, control and or possession? The simple answer is that it would fit all three. It could be custody, control, or possession. Since it could be possession, then the prosecution should be entitled to rely on the presumption of trafficking under s 37(da) of the DDA. In *Ong Ah Chuan v Public Prosecutor* at p 69, the Privy Council per Lord Diplock held 'the larger the quantity of drugs involved the stronger the inference that they were not intended for personal consumption'. That should translate, the lesser the quantity, the weaker the presumption that they were not intended for personal consumption. In the instant case, the quantity involved was more than four times the statutory minimum. But that quantity, albeit not small, was not such that it could be irresistibly inferred that it could not have been for personal consumption. The total absence of any evidence of an overt act would say that the circumstance that it could have been intended for personal consumption could not be ruled out. If it were possession, then trafficking was made out only on a not too strong presumption of trafficking. Of course, if it were a case of custody and or control, then trafficking was not made at all in the absence of evidence of an overt act. The fate of the accused hung on that balance. A ruling that it was possession would attract the presumption of trafficking. A ruling that it was custody and or control would mean that trafficking was not made. In the face of that difficult choice, it should seem more just and fair, also infinitely safer, to give the benefit to the accused, to find that the lesser offence, but not the more serious, had been made out.

[23] For these reasons, the charge was amended to one of possession and punishable under s 39A(2) of the DDA, to which the accused pleaded guilty thereto and was sentenced to serve a term of imprisonment of 14 years and to suffer 10 strokes of the cane.

Charged amended to a lesser offence of possession and accused convicted on guilty plea.

Reported by Andrew Christopher Simon